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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN LEONIDES ESCOBAR et al., Defendants and Appellants.	B259309 (Los Angeles County Super. Ct. No. TA127185)

APPEAL from judgments of the Superior Court of Los Angeles County, Ricardo R. Ocampo, Judge. Affirmed.

Wegman & Levin, Debra J. Wegman and Michael M. Levin for Defendant and Appellant Jonathan Leonides Escobar.

William L. Heyman, under appointment by the Court of Appeal, for Defendant and Appellant Jorge Gutierrez.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellants Jonathan Leonides Escobar and Jorge Gutierrez appeal from the judgments entered after a jury convicted each of them on two counts of attempted willful, deliberate, and premeditated murder (counts 1 & 2) and on count 3 – shooting from a motor vehicle. On each of counts 1 and 2, as to Escobar, the jury found a principal personally and intentionally discharged a firearm causing great bodily injury. On each of counts 1 and 2, as to Gutierrez, the jury found he personally and intentionally discharged a firearm, and personally and intentionally discharged a firearm causing great bodily injury. On count 3, as to Gutierrez, the jury found he personally used a firearm. The jury also found, as to each appellant on each of the above counts, the offense was committed for the benefit of, at the direction of, or in association with, a criminal street gang. (Pen. Code, §§ 186.22, subd. (b)(1), 664, 187, 12022.5, 12022.53, subds. (c), (d) & (e)(1) & 26100, subd. (c).[1]) The court sentenced each appellant to prison for 80 years to life. We affirm**.**

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that in February 2013, 17-year-old Justin Padilla (Justin)[2] lived in an apartment at Grand and Imperial Highway in Los Angeles. About 9:00 p.m. on February 27, 2013, Justin and his friend Diego Fernandez (Diego) were playing in the backyard. Neither Justin nor Diego was a gang member.

A Toyota automobile drove up and stopped 21 feet from Justin and 29 feet from Diego. The Toyota's passenger side was closest to Justin and Diego. The car contained two Hispanic men and the passenger had a scarf or bandana covering his mouth. The car's front passenger window was down. The passenger asked Justin and Diego, "Where you fools from?" Justin believed the question was a gang challenge. Justin did not pull out a weapon and he never saw Diego pull out one. The passenger began shooting.

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1 Unless otherwise indicated, subsequent section references are to the Penal Code.

2 To avoid confusion with another witness having the same last name, we refer to both victims by their first names.

Justin heard eight or 10 shots and ran towards the apartment building. A bullet struck Justin in the ankle and he fell. Another bullet struck Justin in the buttocks. Justin rose and entered his apartment. As Diego was running, he heard multiple gunshots but not more than 15. Diego was not hit by gunfire. However, the prosecutor asked if Diego could hear "bullets hitting anything around [Diego]" and Diego replied, "Yes, the gate." The bullet made a hole in the gate. Diego heard Justin falling behind him. Diego went back to Justin as shots were fired. The Toyota drove away.

Los Angeles Police Officer Billy Lee was off-duty and driving his personal car on Grand when he heard shooting. He heard six to eight more shots and saw muzzle flashes coming from the front passenger window of a Toyota about 130 to 150 feet in front of him in the southbound curb lane. The front passenger was shooting in a westerly direction towards an apartment complex on the northwest corner of Grand and Imperial Highway. Lee saw a person's arm and hand extending out the window and the hand was holding a firearm. After the shooting, the Toyota sped away.

Lee called 911 and followed the Toyota. Lee, later assisted by Los Angeles Police Officers Gil Padilla and Phillip Sudario in a patrol car, engaged in a high speed pursuit of the Toyota. During the pursuit, the Toyota crashed into a car, a black object was thrown from the driver's side of the Toyota, and the pursuit resumed. The pursuit ended near the 405 and Harbor freeways. The driver and passenger exited the Toyota and fled. Sudario ran after the driver, Escobar, and detained him. The passenger, Gutierrez, fled into nearby bushes and Lee saw officers detain him. Later, Los Angeles Police Detective Joseph Kirby was escorting Escobar through the police station when Escobar yelled at Gutierrez, "You better not snitch."

Los Angeles Police Detective Rosa Torres went to the shooting scene and found eight .40-caliber casings on Grand. The casings were consistent with a car's occupant firing a firearm while reaching out the window. Torres observed bullet damage on a fence near a gate, and on a fence towards the rear of the apartment complex. Los Angeles Police Officer Marcos Mercado went to the Harbor Freeway near the Rosecrans onramp (where the black object had been thrown from the Toyota) and found parts of a

.40-caliber semiautomatic handgun. Gutierrez's hands tested positive for gunshot residue, which meant he had discharged a firearm, had been in the immediate vicinity of a discharging firearm, or had contacted the surface of an object (e.g., a gun or bullet) already contaminated with residue.

Several officers testified to having personal interaction with appellants prior to the shooting. Los Angeles County Sheriff's Deputy Anthony Fernandez identified Escobar in court. Fernandez testified he was on patrol on March 4, 2011, when he contacted Escobar at 1219 106th Street in the company of Eric Diaz and Luciano Islas.[3] In an admissibility hearing conducted under Evidence Code section 402, Fernandez described that he "consensually contacted [Escobar], walked up to him, introduced myself, and saw him and two other individuals." Fernandez testified at trial that when Fernandez asked whether Escobar was affiliated with a gang, Escobar admitted, "I'm from Junior Mafia" (JM) and that his moniker was Smiley. Escobar also showed Fernandez his tattoo with the letters SCLA. Based on a photograph, Fernandez identified, in court, that the tattoo on Escobar's body was the one he saw during the March 2011 contact. Respondent's gang expert, Los Angeles County Sheriff's Detective Albert Arevalo, testified that the SCLA tattoo identified the South Central clique of the JM gang and that he had seen SCLA tattoos on other JM members.

Other law enforcement personnel testified to their prior contacts with Gutierrez. Los Angeles Police Officer Jose Bonilla identified Gutierrez in court and testified to a May 23, 2012 conversation with Gutierrez and Javier Alvarez. According to Bonilla, Gutierrez and Alvarez told him they were JM members, known respectively by the monikers "Speedy" and "Huero." Los Angeles County Sheriff's Deputy Jeremiah Hooper testified that on October 13, 2011, he contacted Gutierrez and three other people

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[3] Fernandez used a field identification card to refresh his memory as to Islas's name. The card was not admitted into evidence. Los Angeles County Sheriff's Detective Albert Arevalo testified that Diaz and Islas told him they were Junior Mafia gang members with the monikers Scrappy and Lefty, respectively.

including Gustavo Reyna and Javier Alvarez who were gathered at 107th and Budlong in Los Angeles.

Arevalo recalled that various unidentified JM members told him that Gutierrez was a JM member known as Speedy. Arevalo also testified that Emmanuel Mendoza, a JM member known as Flaco who sometimes served as an unpaid informant, told Arevalo that Mendoza's brother "Jorge" was a JM member known as Speedy. Testifying as an expert, Arevalo opined Gutierrez was an active JM member based on (1) Hooper's report that he saw Gutierrez with other gang members at 107th and Budlong (in JM territory) on October 13, 2011, (2) the fact that Gutierrez's associates as reflected in Hooper's field identification card were gang members, (3) Bonilla's "report," (4) contacts Arevalo had had with JM members who told him Gutierrez, also known as Speedy, was an active JM member, and (5) the fact Emmanuel Mendoza told Arevalo that Mendoza and his brother were JM members, Mendoza's brother's name was Jorge, and Jorge's moniker was Speedy.

Arevalo also opined that Escobar was a JM member based on (1) Escobar's March 4, 2011 admission to Fernandez (memorialized in a field identification card) that he was an active JM member whose moniker was Smiley, (2) the fact that Escobar's admission occurred in JM gang territory (1219 106th Street), and (3) the fact that Escobar had a tattoo indicative of JM's South Central clique. Arevalo further opined that appellants were respected JM members who were soldiers, i.e., violent members assigned to commit shootings, identifying as the basis for his opinion his conversations with various unidentified JM members. When cross-examined about that opinion, Arevalo denied that gang members told him Gutierrez was a "soldier." Arevalo testified that gang members characterized Gutierrez "as an active gang member . . . I guess, in essence, a soldier."

Explaining his qualifications to testify as an expert, Arevalo testified he was assigned to a gang unit and had investigated the JM criminal street gang and the crimes it committed in his jurisdiction since 2009. Prior to this case, Arevalo had testified dozens of times as a JM expert and as a South Los gang (South) expert. JM had about 80 documented members and Arevalo had spoken with more than 12 of them. During the

Evidence Code section 402 admissibility hearing, he testified he learned about gangs by talking to gang members and their families casually and consensually out in the field or when he happened to chat with them while working as a jailer. Arevalo always corroborated what he learned from gang members.

Arevalo explained the hierarchy of respect in gangs, testifying that gang members gain respect from their peers by putting in work (committing more violent and conspicuous crimes). He contrasted lower level gang members who break into cars or peddle dope with gang members "that are soldiers or gunners . . . the violent ones . . . the ones that people can count on to go do shootings." He specifically identified JM's hand signs, graffiti, and symbols, and types of hats worn by JM members.

Arevalo provided testimony specific to the day of appellants' shootings. He stated that earlier the same day, about 7:00 a.m. on February 27, 2013, South members shot JM members Javier Alvarez and Carlos Reyna at Imperial Highway and Vermont, killing Reyna and injuring Alvarez. In response to a hypothetical question based on evidence, Arevalo testified the present shooting was committed for the benefit of, and in association with, the JM criminal street gang. The shooting benefited JM because Carlos Reyna, a well-respected JM member, had been murdered earlier that day. The present shooting happened shortly thereafter and was, in Arevalo's opinion, a retaliatory shooting that enhanced JM's reputation for violence and demonstrated to a rival gang that JM would retaliate if something happened to a JM member. Appellants' shooting also created fear in the community, making it less likely community members would report JM's criminal activity. Although the shooting was not at South members, Arevalo testified the shooting benefited JM because it was carried out in South's territory.

Arevalo opined the present shooting was committed in association with a gang because the driver and shooter were JM members, explaining that when gang members went on missions, the gang members brought trusted persons who would act as backup, not "snitch," and confirm to a gang that a gang member had committed a crime. Arevalo opined the present shooting was a gang crime because it occurred in South's area in the midst of growing sentiment that South members killed Carlos Reyna, making it

incumbent on JM to retaliate against South members or in South territory.[4] Arevalo found no documentation the victims (Justin or Diego) were gang members.

In the defense case, Escobar's gang expert, Martin Flores, testified one possibility was the present shooting benefited the gang, but another possibility was the shooter had a personal "beef" with the targeted persons and the driver did not know what was happening. He opined that the rule in Hispanic gangs was not to target a random civilian. Gutierrez presented witnesses testifying about his good character, nonviolent nature, and lack of gang affiliation.

ISSUES

Gutierrez asks this court to conduct an independent review of the in camera hearing on his *Pitchess*[5] motion. He also claims (1) insufficient evidence supports his convictions, the premeditation and deliberation findings, and the gang finding, (2) the trial court erroneously imposed consecutive sentences, concerning which Gutierrez's trial counsel rendered ineffective assistance of counsel, and (3) Gutierrez's sentence constituted cruel and unusual punishment.

Escobar claims (1) the People relied on testimonial hearsay to prove the gang enhancement, (2) the Sixth Amendment prohibits an expert witness from disclosing testimonial hearsay as basis evidence at trial, (3) under California law, Arevalo's disclosure of testimonial hearsay as basis evidence violated Escobar's Sixth Amendment confrontation right, and (4) the prosecutor's closing argument constituted impermissible comment on Escobar's exercise of a constitutional right.

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[4] Arevalo added, "you don't have to say, 'Where are you from' . . . . Everyone in that neighborhood who's a gang member, from Junior Mafia or South Los, knew that Carlos Reyna . . . had been killed, knew that [he] was shot by South Los gang members." Gutierrez interrupted, posing a speculation objection. Escobar's counsel interjected, "Everybody in that neighborhood knew." The court stated, "As to that, that will be stricken as speculation."

[5] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

DISCUSSION

1. *The Trial Court Fulfilled Its Responsibilities Under Pitchess.*

Gutierrez filed a pretrial *Pitchess* motion seeking information from the personnel files of Arevalo on various issues. The supporting declaration of Gutierrez's counsel reflected that on May 15, 2013, Arevalo told a deputy district attorney that Gutierrez had admitted to Arevalo that Gutierrez was in a gang. Gutierrez's counsel, on information and belief, denied Gutierrez made any statement to Arevalo. At the May 21, 2014 hearing on the motion, the court granted the motion, limited to the issues of "dishonesty and moral turpitude," then conducted an in camera hearing and ordered sealed the transcript thereof. Following the in camera hearing, the court indicated that, after reviewing what the Los Angeles County Sheriff's Department (the real party in interest) had presented in camera, the court was not ordering discovery.

Gutierrez asks this court to conduct an independent review of the in camera hearing. Trial courts are granted wide discretion when ruling on motions to discover police officer personnel records. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827 (*Samayoa*); *People v. Memro* (1995) 11 Cal.4th 786, 832.) We have reviewed the contents of the sealed transcript of the May 21, 2014 in camera hearing. The transcript constitutes an adequate record of the trial court's review of any document(s) provided to the trial court during said hearing, and fails to demonstrate the trial court abused its discretion by failing to disclose information. (Cf. *Samayoa*, at p. 827; see *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1230, 1232.) The trial court fulfilled its responsibilities under *Pitchess*.

2. *Sufficient Evidence Supports Gutierrez's Convictions and the Premeditation and Gang Findings.*

Gutierrez claims there is insufficient evidence supporting his convictions and the premeditation, deliberation, and gang findings. We disagree. "Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) Evidence of attempted murder must establish "the defendant harbored express malice

toward the victim, i.e., the defendant either desired the victim's death or knew to a 'substantial certainty' that the victim's death would occur. [Citation.]" (*People v. Anzalone* (2006) 141 Cal.App.4th 380, 389.) The act of discharging a firearm toward a victim at close range in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill. (*People v. Smith* (2005) 37 Cal.4th 733, 741.)[6] Moreover, the law applicable to premeditation and deliberation is settled.[7]

In the present case, there was substantial evidence supporting the convictions and the findings of premeditation and deliberation. Justin and Diego, neither of whom was armed or a gang member, were innocently playing in the backyard of Justin's apartment building when Escobar drove up in a Toyota with Gutierrez. Escobar pulled the Toyota

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[6] The court, using CALCRIM No. 600, instructed the jury, inter alia, that (1) to prove attempted murder, the People had to prove the defendant intended to kill a person, and (2) the attempted murder of Diego was based on the kill zone theory the defendant intended to kill Justin by killing everyone in the kill zone, including Diego, or based on the theory the defendant intended to kill Diego.

[7] "Deliberate" means arrived at as a result of careful thought and weighing of considerations for and against the proposed course of action, and "premeditated" means considered beforehand. (*People v. Perez* (1992) 2 Cal.4th 1117, 1123.) Deliberation and premeditation can occur in a brief period of time. The true test is not the duration of time as much as it is the extent of the reflection. (*People v. Thomas* (1945) 25 Cal.2d 880, 900.) *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, sets forth three categories of evidence relevant to whether a defendant harbored premeditation: planning activity, prior relationship, and (in the context of murder) the manner of killing. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1019.) The act of obtaining a weapon is evidence of planning consistent with a finding of premeditation and deliberation. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1081-1082.) An assailant's use of a firearm against a defenseless person may show sufficient deliberation. (*People v. Bolin* (1998) 18 Cal.4th 297, 332-333.) A jury may determine whether premeditation exists "from a consideration of the type of weapon employed and the manner of its use; the nature of the wounds suffered by the [victim]; the fact that the attack was unprovoked and that the [victim] was unarmed at the time of the assault; the conduct of [the] assailant in . . . neglecting to aid [the victim], and [the assailant's] immediate flight thereafter from the scene of the assault." (*People v. Cook* (1940) 15 Cal.2d 507, 516.) The jury may also consider efforts to conceal the weapon used. (*People v. Clark* (1967) 252 Cal.App.2d 524, 529.)

over to the curb, placing Gutierrez, who was on the passenger side, as close as possible to the victims. The positioning of the Toyota evidenced planning activity, as did the fact the front passenger window was down when the car came to a stop. Gutierrez's election to conceal his face with a scarf or bandanna evidenced planning and demonstrated consciousness of guilt. Appellants were gang members and Gutierrez asked Justin and Diego, "Where you fools from," a gang challenge.

The fact Gutierrez immediately fired meant appellants arrived with the gun loaded, intending to shoot. Gutierrez fired not once, but at least eight times in a westerly direction toward the location where Justin and Diego were playing, wounding Justin in the buttocks and ankle. Casing evidence discovered at the location of the shooting was consistent with the passenger firing the gun while reaching out the window. Reaching out the window demonstrated an intent to shorten the distance between Gutierrez and the victims. Although the bullets missed him, Diego heard one strike a nearby gate. Diego was close enough to Justin to hear him fall and to try to help Justin before the shots ended. Appellants' flight from the scene, speeding away in the Toyota, manifested consciousness of guilt. (Cf. *People v. Pensinger* (1991) 52 Cal.3d 1210, 1246; § 1127c.)

Lee pursued appellants, and Padilla and Sudario later joined Lee and conducted a high speed chase. During the pursuit, one of the appellants, or both of them, threw out of the Toyota's driver's side window a .40-caliber semiautomatic handgun, further manifesting consciousness of guilt. After the Toyota finally stopped with police in pursuit, appellants fled from the Toyota on foot, again evidencing consciousness of guilt. Escobar's admonition to Gutierrez not to snitch was also evidence of Escobar's consciousness of guilt. (*People v. Slocum* (1975) 52 Cal.App.3d 867, 887.) Gutierrez had gunshot residue on his hands, evidence he was the shooter. As we discuss *post*, there was substantial evidence appellants were JM members who committed the present shootings for the benefit of, and in association with, JM, in retaliation for South's shooting of other JM members earlier that day.

The fact the bullets were not lethal does not undermine the evidence of intent to kill. There was substantial evidence Gutierrez fired a fusillade of bullets in the direction of Justin and Diego supporting the jury's conclusion that appellants' purpose was to kill Justin and Diego. The fact "the victim[s] may have escaped death because of the shooter's poor marksmanship" when using a high-caliber weapon does not vitiate intent to kill. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945.) We conclude there was sufficient evidence Gutierrez and Escobar committed the attempted deliberate and premeditated murders of Justin and Diego to uphold the convictions.

We also find sufficient evidence to support the gang findings. In his opening brief, Escobar argues "The *only* evidence of [his] connection to a gang, other than the events underlying this case, was Dep. Fernandez' testimony, which was based on the March 2011 [field identification] card, three years before trial." (Italics added.) We reject the argument because it is not supported by the record. Fernandez testified that on March 4, 2011, Escobar admitted to Fernandez that Escobar was a JM member. Fernandez testified from personal knowledge and recollection of his encounter with Escobar, only using the field identification card (which was not admitted into evidence) to refresh his memory as to Isla's name. Escobar's admission of JM gang membership was corroborated by the SCLA tattoo he displayed to Fernandez in 2011, a tattoo that remained on his body at the time of trial, and was identified by Arevalo as a tattoo worn by other gang members. When Fernandez encountered Escobar in 2011, Escobar was in JM gang territory and in the company of Luciano Islas, who, on another occasion, admitted to Arevalo that he was a JM gang member. A New York Mets hat typically worn by JM members was also found in appellants' vehicle.

The location of the shooting (in or on the border of the South's territory), its perpetration by two JM gang members (one of whom asked the victims where they were from), and its occurrence hours after JM members learned that one of their members was the victim of a fatal shooting attributed to a rival gang, provide additional evidence of Escobar's gang affiliation and commission of the crime for gang-related purposes. The evidence supports a finding of substantial evidence Escobar committed the present

offenses "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" within the meaning of section 186.22, subdivision (b)(1). (Cf. *People v. Albillar* (2010) 51 Cal.4th 47, 59-63, 68; *People v. Leon* (2008) 161 Cal.App.4th 149, 163; *People v. Romero* (2006) 140 Cal.App.4th 15, 19-20; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198-1199.) The evidence Gutierrez committed the crimes for gang-related purposes is likewise sufficient to support his gang finding.

3. *The Court Did Not Erroneously Fail to Exercise Informed Discretion When Imposing Consecutive Sentences on Counts 1 and 2.*

a. Pertinent Facts.

The People filed a three-page sentencing memorandum asking the court to impose a 40-year-to-life prison sentence on each of the two counts. The second page listed the offenses and requested a sentence for both defendants of "40-life" on count 1 and "40-life" on count 2 noting that "[u]nder this computation, the total sentence for each defendant is 80 to life." Although it did not use the word "consecutive," the memorandum asked the court to impose consecutive sentences. Aside from referencing the charges on which the jury found appellants guilty, and the jury's findings on the gang and firearm allegations, the memorandum did not present argument in favor of imposing consecutive, as opposed to concurrent, sentences. Neither appellant filed a sentencing memorandum.

Although the probation report did not expressly address the issue of consecutive versus concurrent sentences for either appellant, it did address aggravating and mitigating factors pertinent to any exercise of discretion in sentencing. With regard to Gutierrez, it reported he was 21 years old at the time of the present offenses. He was convicted on two prior offenses: a 2012 misdemeanor conviction for driving without a license (Veh. Code, § 12500, subd. (a)) and a 2012 felony conviction for evading a peace officer (Veh. Code, § 2800.2, subd. (a)). The court placed him on probation for three years, during which he reported for probation supervision and paid $140 toward his $3,942 financial obligations.

The report recommended a state prison commitment, noting Gutierrez was "an active gang member, who shot at the victims and caused injury" and created a "dangerous, violent situation and a potentially fatal scene in a residential community." The report listed as aggravating factors (1) Gutierrez was on probation when the crime was committed, (2) his prior performance on probation was unsatisfactory, (3) he had engaged in violent conduct that indicated a serious danger to society, and (4) the manner in which the crime was carried out indicated planning, sophistication, and professionalism. An additional aggravating factor, i.e., "prior criminal history increasing in seriousness" was handwritten on the report. The report indicated there were no mitigating circumstances.

With regard to Escobar, the probation report recounted that Escobar was 20 years old at the time of the present offenses and had outstanding 2012 charges for possession of a controlled substance and vandalism, resulting in a pending case. (Health & Saf. Code, § 11377, subd. (a); § 594, subd. (b)(1).) The report noted that the attempted murder offenses show "he is a threat and danger to others" and that "his involvement with a criminal street gang makes him a further threat to others." It listed as an aggravating factors, "great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness" and "planning [and] sophistication." The report recommended a state prison sentence listing, as a mitigating factor, Escobar's lack of a prior criminal record.

During the sentencing hearing, the court opened by stating it had "read and considered" appellants' probation reports and also had considered the People's sentencing memorandum. The court then invited argument from Gutierrez's counsel who stated, "I know that we're in a position where the statute and the court's -- the limitations of the sentence are pretty clear, and it's a very high sentence." Gutierrez's counsel then recited mitigating factors that Gutierrez was a young man with a supportive family, and a good kid who did not get into trouble. Although letters of recommendation are not part of the record on appeal, they were submitted to the court and, as argued by Gutierrez's counsel, evidenced Gutierrez's "exemplary" life.

Gutierrez's counsel acknowledged that the court had limited discretion, stating "to the extent that the court has any discretion, which I know in this case there isn't much, I'd ask you to exercise that because basically, he, if given the opportunity, could have been anything." Escobar's counsel submitted the matter without argument. The court then inquired whether the prosecution had submitted a victim impact statement (there was none).

Before imposing sentence, the court addressed the mitigating factors for Gutierrez (noting he was "sort of the good child"). The court then stated, "However, it was Mr. Gutierrez who had the gun in his hand. It was Mr. Gutierrez who decided to pull the trigger. Although that does not make a difference, I did need to address that issue because this is, as [Gutierrez's counsel] states, it's mandatory sentencing." The court sentenced each appellant to prison on each of counts 1 and 2 to 15 years to life for attempted premeditated murder, plus 25 years to life for a firearm enhancement, and ordered each appellant to serve the terms on counts 1 and 2 consecutively, with the result each appellant's total prison sentence was 80 years to life. As to both appellants, the court stayed punishment on count 3 pursuant to section 654.

b. Analysis.

Gutierrez claims the trial court's imposition of consecutive sentences was error because it was unaware it had discretion to impose concurrent rather than consecutive 40-year prison sentences on counts 1 and 2. Escobar joins in the claim.[8] As noted in *People v. Downey* (2000) 82 Cal.App.4th 899, " 'Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal. [Citations.]' [Citation.]

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[8] As respondent observes, purported "blanket statement" joinders of one appellant in the claim(s) of a coappellant, such as Escobar's purported joinder in Gutierrez's claim here, are disapproved. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 363-364.) However, to forestall a claim of ineffective assistance of appellate counsel (cf. *People v. Holford* (2012) 203 Cal.App.4th 155, 159, fn. 2; see *People v. Turner* (1990) 50 Cal.3d 668, 708), our analysis and disposition of this sentencing issue applies to Escobar as well.

Where . . . a sentence choice is based on an erroneous understanding of the law, the matter must be remanded for an informed determination. [Citations.]" (*Id.* at p. 912.)

We find, however, that the record does not support an inference that the trial court was unaware of its discretion. There is no dispute that a prison sentence of 40 years to life on each of counts 1 and 2 was mandatory. (*People v. Oates* (2004) 32 Cal.4th 1048, 1062-1068 [section 654's multiple victim exception applies]; *People v. Campos* (2011) 196 Cal.App.4th 438, 445, 448-454 [mandatory 15-year minimum parole eligibility term for attempted premeditated murder with gang finding]; §§ 186.22, subd. (b)(5), 187, subd. (a), 664, subd. (a), 12022.53, subds. (a)(1) & (18), (d) [mandatory firearm enhancement of 25 years to life], (g), & (h).) "It is well established that a trial court has discretion to determine whether several sentences are to run concurrently or consecutively. (Pen. Code, § 669; [citation].)" (*People v. Bradford* (1976) 17 Cal.3d 8, 20.) We presume the trial court was aware of the law (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496; Evid. Code, § 664) and therefore understood it had discretion to impose concurrent sentences.

The conduct of the trial court supports the inference it knew and understood the extent of its discretion. Because the 40-year prison sentence on each count was mandatory, the only possible relevancy of evidence in mitigation was to guide the court's determination whether to impose consecutive or concurrent sentences. The trial court's understanding of its discretion to impose concurrent sentences is manifested in its election to review the probation report, invite and hear argument from counsel at the sentencing hearing, its inquiry whether the prosecution submitted a victim impact statement, and its express consideration of mitigating factors. If the trial court believed it had no discretion whatsoever, it had no reason to engage in this conduct. As noted in *People v. Leung* (1992) 5 Cal.App.4th 482, 501, "had the court believed that consecutive terms were mandatory, it would not have stated reasons for their imposition since none would have been required."

The court's appreciation of its discretion to impose concurrent or consecutive sentences is further manifested by its comments regarding mitigating factors after Gutierrez's counsel reminded the court of its discretion when Gutierrez's counsel said, "to the extent that the court has any discretion" and when Gutierrez's counsel acknowledged that it "isn't much." Although it is not entirely clear which aspect of the sentencing the court referenced in its final comments about mandatory sentencing, the fact the comments immediately follow the court's remarks about Gutierrez's use of a firearm indicate that the court was referring to the mandatory sentencing on the firearm enhancement. In the context of the court's review and consideration of mitigating factors, it is not reasonable to interpret the court's remarks as evincing ignorance of the only discretion in sentencing available to be exercised.[9]

4. *There Was No Violation of Escobar's (or Gutierrez's) Right to Confrontation.*

In *Crawford v Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177] (*Crawford*), the high court "held that '[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.' [Citation.]" (*People v. Johnson* (2015) 61 Cal.4th 734, 761, fn. omitted.) In *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*), our Supreme Court observed that *Davis v. Washington* (2006) 547 U.S. 813 [165 L.Ed.2d 224] "made

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9 Although Gutierrez claims his prison sentence constituted unconstitutionally cruel and/or unusual punishment, he waived the issue by failing to object on those grounds below. (Cf. *People v. Benson* (1990) 52 Cal.3d 754, 786, fn. 7; *People v. Norman* (2003) 109 Cal.App.4th 221, 229; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) With respect to the sentence of 40 years to life on each of counts 1 and 2 (i.e., life with the possibility of parole (§ 664, subd. (a)) with a 15-year minimum parole eligibility term (§ 186.22, subd. (b)(5)) plus 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)), we conclude his sentence did not violate constitutional proscriptions against cruel or unusual punishment. (Cf. *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1212-1216; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 16-18.) We also reject Gutierrez's claim of ineffective assistance of counsel. As noted in *People v. Pope* (1979) 23 Cal.3d 412, 426, we affirm "[where] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . ." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

clear that the confrontation clause applies only to testimonial hearsay statements and not to such statements that are nontestimonial." (*Geier*, at p. 603.) Although the Supreme Court in *Crawford* did not define "testimonial evidence," it noted that such testimony includes statements made " 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial' " such as "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and [statements made during] police interrogations." (*Crawford* , at pp. 52, 68.)

Recently, in *People v. Sanchez* (2016) 63 Cal.4th 665, the California Supreme Court reversed a finding by the jury that a gang allegation was true, holding that "case-specific statements related by the prosecution expert concerning defendant's gang membership constituted inadmissible hearsay" (*id*. at p. 670) and that "[s]ome of those hearsay statements were also testimonial and therefore should have been excluded under *Crawford*."[10] (*Id.* at pp. 670-671.)

In *Sanchez,* the gang expert, Detective Stow, testified that the defendant was a member of the Delhi gang (Delhi) and possessed a firearm, and narcotics for sale, for the benefit of Delhi. (*Sanchez, supra,* 63 Cal.4th at p. 673.) As the basis for his testimony, Stow relied on information and/or statements contained in police documents, i.e., (1) a "STEP notice,"[11] (2) two police reports relating the circumstances of the defendant's presence during, and/or his statements to police about, two shootings of gang members, respectively, (3) a field identification card relating a police contact with the defendant, who was in the company of a Delhi member, and (4) a police report relating a police contact and the defendant's arrest with a Delhi member. (*Id. at* pp. 672-673.)

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[10] *Sanchez* was decided after argument in this case. We invited further briefing from the parties addressing the impact, if any, of *Sanchez* on this case. We have reviewed and considered the additional briefing.

[11] "This acronym is a reference to the California Street Terrorism Enforcement and Prevention Act." (*Sanchez, supra,* 63 Cal.4th at p. 672, fn. 3.)

Stow admitted he had never met the defendant and was not present when the defendant was given the STEP notice or when the other police contacts with the defendant occurred. (*Sanchez, supra,* 63 Cal.4th at p. 673.) The police reports were not admitted into evidence. (*Id.* at p. 694.)

Notwithstanding the trial court's instruction that the jury not accept the other officers' statements as proof of the truth of the matters stated, the Supreme Court concluded there was no denying that such case-specific facts are offered as true. Without independent competent proof of these facts, the jury had no basis on which to accept the expert's opinion. (*Sanchez, supra*, 63 Cal.4th at p. 684.) "What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id.* at p. 686.)

Sanchez went on to review post-*Crawford* case law and observed that statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency, but statements are testimonial when the circumstances objectively indicate there is no such ongoing emergency and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. (*Sanchez, supra*, 63 Cal.4th at p. 688.) *Sanchez* noted that other post-*Crawford* decisions turned on the formality of the statement at issue. (*Id.* at p. 692; see *People v. Dungo* (2012) 55 Cal.4th 608, 619.)

Sanchez concluded that (1) the STEP notice signed by a police officer under penalty of perjury and relating information about, and statements made by, the defendant, and (2) the police reports, which were compiled during a police investigation of completed crime, were testimonial. (*Sanchez, supra,* 63 Cal.4th at pp. 694-697.) *Sanchez* also concluded that a field identification card, if made in the course of an ongoing investigation of a crime, would be testimonial. (*Id.* at p. 697.) On the other hand, testimony providing information that was not case-specific and that concerned

general gang behavior, its territory, and the gang's conduct was relevant and admissible. (*Id.* at p. 698.)

In this case, the People did not rely exclusively on Arevalo's expert testimony to establish facts recorded in field identification cards. Instead, the People called and subjected to cross-examination, several officers who had contact with appellants. Although Escobar (joined by Gutierrez) contends that Arevalo improperly relied "on FI cards (other than the one Dep. Fernandez testified about)," the record demonstrates that Arevalo only relied on Fernandez's field identification card when he testified about Escobar. The only field identification card not pertaining to Fernandez that Arevalo referenced was Bonilla's field identification card identifying appellant Gutierrez. Because both Fernandez and Bonilla testified from personal knowledge at trial, their statements in police reports were not hearsay and did not implicate the confrontation clause.

Escobar's contention that "casual conversations with unidentified individuals including gang members and police officers" was improper testimonial hearsay under *Crawford* is incorrect as a matter of law. The key issue for distinguishing testimonial statements from nontestimonial statements under *Crawford* is whether the information was elicited in a formal setting like a preliminary hearing, a police interrogation, or a formal investigation. As noted in *People v. Cage* (2007) 40 Cal.4th 965 (*Cage*), "the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial." (*Id.* at p. 984.) *Cage* noted that, according to *Crawford*, " '[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a *casual* remark to an acquaintance does not.' [Citation.]" (*Cage*, at p. 984, fn. 14, italics added.) While testimony based on casual conversations may constitute statements inadmissible under the rules governing hearsay, it is not testimonial hearsay for purposes of *Crawford*.

In supplemental briefing, Escobar identifies additional testimony that he contends was admitted in violation of *Crawford*: Arevalo's testimony South members shot at JM

members earlier that day, Arevalo's testimony there was a "turf war," and his testimony that appellants were " 'soldiers' with a propensity for violence who could be counted on by the gang to 'go do shootings.' " As explained below, we find no error in the admission of these statements.

Before permitting Arevalo to testify at trial, the trial court allowed appellants to cross-examine Arevalo in an Evidence Code section 402 hearing conducted outside the presence of the jury. During that hearing, Arevalo testified that he was present when Alvarez, a JM member who was a victim of the 7:00 a.m. shooting attributed to South, told homicide detectives that he recognized the shooter as a South gang member. Escobar's trial counsel argued that Arevalo's testimony the shooting was in retaliation for the early morning shooting should be excluded as testimonial hearsay because the information was "gained during investigations for purposes of prosecution." The trial court overruled the objection, concluding the testimony was admissible nontestimonial evidence because it came from a witness who was not in custody and was being interviewed as a victim.

However, confrontation clause error under *Crawford* does not depend on whether the out-of-court declarant is a suspect or a victim; it depends on the circumstances under which the hearsay statement was made. In *Cage*, a victim waiting in the emergency room an hour after sustaining injuries described the circumstances of his stabbing to a police officer who asked, "What happened?" Although the conversation was informal, our Supreme Court concluded the victim's statements were testimonial noting that "the requisite solemnity was imparted by the potentially criminal consequences of lying to a police officer." (*Cage, supra*, 40 Cal.4th at p. 986.) There is no dispute that Arevalo's knowledge that Alvarez identified the South shooter came from a conversation with homicide police officers who were investigating the homicide of Alvarez's companion. If Arevalo had quoted Alvarez's statement to police at trial, Arevalo's testimony would have constituted testimonial hearsay in violation of the confrontation clause if offered for the truth of the matter.

However, Alvarez's statements attributing his shooting to a rival gang were not offered for the truth of the matter, they were offered to show his motivation to retaliate. As such, they were nonhearsay. Arevalo's testimony "the Junior Mafia gang members believed it was South Los" was likewise admissible because JM members' *perception* that South was responsible for Alvarez's shooting (rather than the accuracy of that perception) was material to appellants' motive to retaliate. We therefore conclude that Arevalo did not offer inadmissible hearsay and that appellants' Sixth Amendment rights were not compromised. (Cf. *People v. Hill* (2011) 191 Cal.App.4th 1104, 1136; see *Cage, supra*, 40 Cal.4th at p.9 84 & fn. 14.)

We also find no error in Arevalo's testimony that appellants were "soldiers" and that the two gangs were engaged in a "turf war." These statements were properly admitted as opinions based on admissible evidence about appellants' ties with the JM gangs and the circumstances of their involvement in the shootings in this case.

5. *No Impermissible Prosecutorial Jury Argument Occurred.*

Kirby testified he was working about 9:00 p.m. on February 27, 2013. The prosecutor asked what role Kirby had in the investigation, and Kirby replied, "*I interviewed the two defendants that night*." Escobar objected the latter testimony violated *Griffin v. California* (1965) 380 U.S. 609 [14 L.Ed.2d 106] (*Griffin*) because the testimony implied Escobar had invoked his Fifth Amendment rights when he was interrogated. The prosecutor explained she had intended only that Kirby testify he had heard Escobar tell Gutierrez, "Don't snitch." The court regarded the challenged testimony as "probably" not proper but concluded no error had occurred under *Doyle v. Ohio* (1976) 426 U.S. 610 [49 L.Ed.2d 91] (*Doyle*) or *Griffin*. The court struck the prosecutor's question and Kirby's answer, and instructed the jury not to consider either for any purpose.

Kirby later testified that while he was escorting Escobar in the station, he heard Escobar yell at Gutierrez, "You better not snitch." During jury argument, Escobar's counsel suggested Escobar was innocently driving and was surprised by the shooting. During final argument, the prosecutor argued Escobar did not pull over for the police, exit the car with hands up, protest his innocence, and say he was a witness and not a crime partner.

Escobar characterizes Kirby's reference to interviewing appellants and the prosecutor's jury argument as *Doyle* and/or *Griffin* error. In *Doyle*, the United States Supreme Court stated, "We hold that the use for *impeachment* purposes of petitioners' *silence*, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." (*Doyle*, *supra*, 426 U.S. at p. 619, italics added.) *Griffin* holds it is error for a prosecutor to comment, directly or indirectly, on the failure of the defendant to *testify*. (*People v. Hughes* (2002) 27 Cal.4th 287, 371-372.) The prosecutor may, however, comment " 'on the state of the evidence.' " (*People v. Hovey* (1988) 44 Cal.3d 543, 572 (*Hovey*).) In determining whether *Griffin* error has occurred, we ask whether there is a reasonable likelihood jurors could have understood the prosecutor's comments to refer to the defendant's failure to testify. (*People v. Clair* (1992) 2 Cal.4th 629, 663.) As noted in *Hovey*, "indirect, brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt can be drawn therefrom, are uniformly held to constitute harmless error." (*Hovey*, at p. 572.) We hold no *Doyle*, *Griffin*, or other constitutional error occurred.

6. The Trial Court Did Not Err by Reading the "Kill Zone" Instruction.

With respect to the uninjured victim, Diego Fernandez, the trial court read that portion of CALCRIM No. 600 pertaining to a kill zone.[12] Gutierrez urges this court to reverse the judgment on the grounds there was no evidence he intended to kill Justin by killing everyone in the area where Justin was located.[13] According to Gutierrez, "there was no indication that bullets were sprayed over a wide area encompassing [Diego]." Gutierrez points to other evidence the shooter aimed in a downward direction as suggesting an intent to instill fear rather than strike the victims.

As explained in *People v. Bland* (2002) 28 Cal.4th 313, 329-330 (*Bland*), a person who desires to kill a particular target may concurrently intend to kill others within a kill zone; where a defendant intentionally creates a kill zone to ensure the death of his primary victim, the trier of fact may reasonably infer, based on the defendant's method of attack, an intent to kill others concurrent with the intent to kill the primary victim. For example, " 'a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire . . . has intentionally created a "kill zone" to ensure the death of [the] primary victim.' " (*Id.* at pp. 329-330.) Under these circumstances, " 'the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim.' " (*Id.* at p. 330.)

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12 "A person may intend to kill a specific victim or victims and at the same time to kill everyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the Attempted Murder of Diego Fernandez, the People must prove that the defendant not only intended to kill Justin Padilla but also either intended to kill Diego Fernandez, or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Diego Fernandez or intended to kill Justin Padilla by killing everyone in the kill zone, then you must find the defendant not guilty of the Attempted Murder of Diego Fernandez."

13 Gutierrez also contends any failure to object constituted ineffective assistance of counsel.

In *Bland*, the court concluded a defendant who shot a flurry of bullets intending to kill the driver of a car concurrently intended to kill the passengers and could be convicted of the attempted murder of others in the automobile (the kill zone). Similarly, in this case, the record contains substantial evidence the victims were playing basketball together when Gutierrez rapidly fired a barrage of bullets (eight or ten bullets) in their direction. There is evidence the victims were close to one another during the shooting. When one or more bullets struck Justin, Diego was close enough to hear him fall. Another bullet struck a gate near Diego. These facts are sufficient to support a finding Diego was in a kill zone appellants created intending to kill Justin, and Gutierrez concurrently intended to kill Justin and anyone in the zone, including Diego. We therefore conclude it was not error to give the kill zone instruction (and any failure by counsel to object to the instruction was not ineffective assistance of counsel).

DISPOSITION

The judgments are affirmed.

HOGUE, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.